A **LAW PANG CHING & ORS**

v.

TAWAU MUNICIPAL COUNCIL

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: S-02-233-2002]
C 4 FEBRUARY 2009

ADMINISTRATIVE LAW: *Judicial review - Local authority - Decision to terminate operation of market - Whether null and void - Doctrine of legitimate expectation - Whether applicants could rely on earlier*
D *representation by authority that they could continue doing business at market - Whether applicants were licenceholders - Whether they had locus standi*

LOCAL GOVERNMENT*: Licence - Cancellation of licence - Stallholders of market affected - Whether cancellation null and void in*
E *view of earlier representation by local authority that they could continue business - Whether doctrine of legitimate expectation applicable - Whether applicants had locus standi*

The appellants were stallholders at the Fuji Market in Tawau,
F Sabah since 1992. The market stood on privately owned land. The stallholders were allowed to do business under a licence granted to the landowner by the respondent local authority. They paid their respective fees to the landowner who in turn paid them to the respondent. Subsequently, the land was transferred to a
G company called ATS Land Sdn Bhd ('ATS'). ATS continued the practice of the earlier landowner in collecting the fees from the stallholders and paying the respondent. In 1998, a lunch gathering was organised by the stallholders with the respondent in which the President of the respondent made a representation that the
H stallholders could continue doing business at the Fuji Market. In 2001, however, the respondent indicated its decision to terminate the operation of the market. Attempts to persuade the respondent to reconsider and revoke its decision including an appeal by the relevant state assemblyman were unsuccessful. Consequently, ATS
I advised the stallholders to cease trading at the market. There was material on record to show that the respondent had leased a piece of land owned by it to a company called Renung Abadi Sdn

Bhd ('Renung') and granted it the right to operate another market thereat called Xin Ann Market. The lease was for 25 years and there was a term that the respondent was not to grant or renew permission to anyone to operate a market within a 3-mile radius of Xin Ann Market. Matters pertaining to the Fuji and Xin Ann markets were discussed at a meeting of the respondent. The minutes of the meeting showed that Renung had commenced an action against the respondent for damages for breach of the terms of the lease and that it had called on the respondent to close down the Fuji Market which the respondent agreed to do. The appellants then instituted judicial review proceedings against the respondent. In the interim period, some stallholders at the Fuji Market took up offers for places at the Xin Ann Market. The appellants, however, refused the offers and pursued their application for judicial review. The High Court dismissed their application and the appellants now appealed before the Court of Appeal.

Held (dismissing the appeal by a majority)
Per Raus Sharif JCA (majority)

(1) The affairs of the market were between ATS and the respondent. The letters of approval and subsequently the termination of the market were addressed to ATS. Therefore, any complaint that the respondent did not adhere to the principle of natural justice in making its decision to terminate the operations of the market rightly should come from ATS and not the appellants. But ATS did not complain. ATS did not even file an affidavit in support of the allegations as alleged by the appellants. Presumably, it had accepted the decision of the respondent to terminate the market. Furthermore, the facts of the case clearly revealed that the appellants had no contractual relationship with the respondent. The appellants were strangers to the arrangement between ATS and the respondent. Hence, they could not step into the shoes of ATS to complain that were deprived by the respondent of the right to be heard and the due process. They had no *locus standi* to do so. (paras 7 & 8)

(2) The appellants' argument on the doctrine of legitimate expectation would have been valid if the land where the market stood belonged to the respondent. However, the market stood on a privately owned land, the registered owner being ATS. (paras 9 & 10)

Per Abu Samah Nordin JCA (majority)

(1) The appellants were not the licenceholders. They had no direct dealing with the respondent. The licenceholder was the landowner. The appellants had been allowed to do business under a licence granted to the landowner on the land owned by the latter that had been approved for a commercial development. The verbal assurance by the respondent's President was made at a luncheon hosted by the latter in the presence of some stallholders. It would not be correct to say that they were invited guests. There was no suggestion that they co-hosted the function. The only logical and reasonable conclusion was that the assurance or representation must have been made or given to the landowner although it was welcome news to the appellants. (para 33)

(2) The landowner was not a party to the application. It had taken a stand that it would not seek legal recourse and would abide by the decision of the respondent. That was decided after its impassioned pleas to the respondent, on its own behalf and for the appellants, had been unsuccessful. Consequently it had, in writing, advised the appellants to cease trading at the market. (para 34)

(3) The reliefs sought by the appellants were essentially for the direct benefit of the landowner who was the licenseholder, although the appellants would stand to gain, if they succeeded in this application. Yet the landowner was not before the court. That was one of the grounds why the High Court dismissed the appellants' application. (para 35)

(4) As the appellants were not the licenseholders, they did not have a legitimate expectation that the approval should not be withdrawn up until they had made their representations. They could only hope that the approval to the landowner would not be withdrawn from which they would have benefited. They could not claim to have a better interest or right than the landowner. (para 36)

Per Gopal Sri Ram JCA (dissenting)

(1) There was only one point that merited consideration. It was the effect in law of the promise or representation made by the respondent's President to the gathering at which the appellants were present that they could carry on doing

business at the Fuji Market. The appellants' rights, if any, in public law fell to be determined by reference to the well-established doctrine of legitimate expectation. (para 40)

(2) There was evidence of a clear and unambiguous representation by the respondent's President that the appellants could continue to do business at the Fuji Market. It was reasonable for the appellants to rely on that representation given the authoritative source from which the representation came from and the fact that it related to a matter affecting the appellants' livelihood. Moreover, the nature of the representation made was not inconsistent with the statutory duties imposed upon the respondent. As such, the respondent as a public body was bound in fairness by the representation made. The representation made to the appellants as a class of persons, namely, the stallholders of Fuji Market, conferred on them a substantive right to continue to remain at Fuji Market, a right that gave rise to an actionable claim. (para 45)

(3) The learned judge was looking for some privity of contract or other legal relationship between the appellants and the respondent. That was a serious misdirection. The appellants' claim before the High Court was not based upon a private law action in contract or tort against the respondent. It was a claim for the public law remedy of judicial review. By adjudging a claim in public law with reference to private law principles was a serious error. (para 47)

(4) The learned judge denied relief on the ground of *locus standi*. That approach clearly fell foul of O. 53 of the Rules of the High Court 1980. The respondent's decision to go back on its word prejudiced the appellants' right to their livelihood. The appellants were persons who were adversely affected by the respondent's decision. (paras 48 & 49)

(5) A pre-existing legal relationship between the public body making the promise or representation and the person to whom it was made was not a *sine qua non* for the doctrine of legitimate expectation to bite. The law had developed far enough for the courts to enforce promises or representations made by or on behalf of a public body to persons who would be adversely affected if those promises or representations were reneged upon. If a public body went back on its word, the persons adversely affected by its act or omission would be able

to obtain the appropriate relief by way of judicial review. From the authorities it can be concluded that the existence of a legitimate expectation was sufficient in itself to confer *locus standi* upon an applicant to bring an application for judicial review. In the present case, there was also no overriding public interest that negated the legitimate expectation of the appellants. (paras 50, 52 & 53)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu adalah pemilik gerai di Pasar Fuji, Tawau, Sabah sejak tahun 1992. Pasar tersebut terletak atas tanah milik persendirian. Pemilik gerai dibenarkan berniaga di bawah satu lesen yang dikeluarkan kepada pemilik tanah oleh responden, iaitu pihakberkuasa tempatan. Pemilik gerai membayar yuran lesen kepada pemilik tanah yang akan membayarnya kepada responden. Tanah tersebut kemudian dipindahmilik kepada sebuah syarikat yang dikenali sebagai ATS Land Sdn Bhd ('ATS'). ATS meneruskan amalan pemilik terdahulu tanah dengan mengumpul yuran dari pemilik gerai dan membayarnya kepada responden. Pada tahun 1998, satu majlis makan tengah hari telah diadakan oleh pemilik gerai dengan responden, dan di situ Presiden responden telah membuat representasi bahawa pemilik gerai boleh meneruskan perniagaan mereka di Pasar Fuji. Bagaimanapun, pada tahun 2001, responden memberitahu keputusannya untuk menamatkan operasi pasar. Beberapa percubaan dibuat supaya responden menarik balik keputusannya termasuk melalui rayuan oleh wakil rakyat, namun usaha-usaha tersebut gagal. Akibatnya, ATS menasihatkan pemilik gerai supaya memberhentikan perniagaan mereka di pasar. Terdapat material pada rekod yang menunjukkan bahawa responden telah memajak sebidang tanah miliknya kepada sebuah syarikat yang dikenali sebagai Renung Abadi Sdn Bhd ('Renung'), dan memberikan syarikat tersebut hak untuk mengendalikan sebuah pasar yang dipanggil Pasar Xin Ann. Pajakan adalah untuk tempoh 25 tahun dan terdapat terma bahawa responden tidak akan memberi atau membaharui kebenaran untuk siapa-siapa mengendalikan pasar lain dalam lingkungan 3 kilometer dari Pasar Xin Ann tersebut. Halperkara berkaitan dengan Pasar Fuji dan Xin Ann kemudian dibincang dalam satu mesyuarat responden. Minit mesyuarat tersebut menunjukkan bahawa Renung telah memulakan tindakan terhadap responden untuk gantirugi kerana kemungkiran terma pajakan, dan bahawa ia menuntut supaya responden menutup Pasar Fuji di mana ianya dipersetujui oleh responden.

Berikutan itu, perayu-perayu memulakan prosiding semakan kehakiman terhadap responden. Sementara itu, sebahagian dari pemilik gerai di Pasar Fuji telah menerima tawaran tempat di Pasar Xin Ann. Perayu-perayu bagaimanapun menolak tawaran yang sama dan meneruskan dengan tindakan semakan kehakiman. Mahkamah Tinggi telah menolak permohonan dan perayu-perayu kini merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan melalui majoriti)
Oleh Raus Sharif HMR (majoriti):

(1) Halperkara mengenai pasar adalah di antara ATS dan responden. Surat-surat kelulusan dan kemudian surat penamatan pasar telah dialamatkan kepada ATS. Oleh itu, sebarang aduan bahawa responden tidak mematuhi prinsip-prinsip keadilan asasi dalam membuat keputusan untuk menamatkan operasi pasar seharusnya datang dari ATS dan bukannya perayu-perayu. Yang nyata ATS tidak membuat aduan. ATS malah tidakpun memfail afidavit sokongan bagi menyokong alegasi yang dibuat perayu-perayu. ATS nampaknya menerima keputusan responden untuk menamatkan operasi pasar. Selain itu, fakta kes menunjukkan bahawa perayu-perayu tidak mempunyai hubungan kontraktual dengan responden. Perayu-perayu adalah orang asing kepada perancangan antara ATS dengan responden. Maka mereka tidak boleh memakai kasut ATS untuk mengadu bahawa hak mereka untuk didengar dan mendapat proses wajar telah dinafikan oleh responden. Mereka tidak mempunyai *locus standi* untuk berbuat demikian.

(2) Hujah perayu-perayu berkaitan doktrin pengharapan sah mungkin sah jika tanah di mana pasar didirikan adalah milik responden. Pasar bagaimana adalah terletak atas tanah persendirian, di mana tuanpunya berdaftarnya adalah ATS.

Oleh Abu Samah Nordin HMR (majoriti):

(1) Perayu-perayu bukanlah pemegang lesen. Mereka tidak mempunyai urusan secara langsung dengan responden. Pemegang lesennya adalah pemilik tanah. Perayu-perayu hanya dibenarkan membuka perniagaan di bawah lesen yang diberi kepada pemilik tanah di atas tanah yang dimiliki oleh pihak terkemudian yang telah diluluskan untuk pembangunan komersial. Janji mulut dibuat oleh Presiden responden pada

majlis makan tengah hari yang dihoskan oleh pihak terkemudian dengan kehadiran sebahagian dari pemilik gerai. Adalah tidak betul untuk menyatakan bahawa mereka adalah tetamu yang dijemput. Tiada sebarang petanda bahawa mereka adalah hos bersama majlis. Satu-satunya konklusi yang munasabah dan logik adalah bahawa janji atau representasi adalah dibuat atau diberi kepada pemilik tanah walaupun ia adalah berita yang dialu-alukan oleh perayu-perayu.

(2) Pemilik tanah bukanlah pihak kepada permohonan. Ia mengambil pendirian bahawa ia tidak akan mencari jalan penyelesaian undang-undang dan akan menyetujui apa sahaja keputusan responden. Itu diputuskan olehnya setelah segala usaha untuk memujuk responden yang dibuat bagi pihak dirinya dan juga perayu-perayu menemui kegagalan. Akhirnya, ia telah menasihati perayu-perayu secara bertulis untuk menamatkan perniagaan di pasar.

(3) Relif-relif yang dipohon perayu-perayu adalah pada asasnya untuk manfaat langsung pemilik tanah sebagai pemegang lesen, walaupun perayu-perayu juga akan menerima manfaat, jika mereka berjaya. Apapun, pemilik tanah tidak berada di mahkamah. Itu merupakan salah satu alasan mengapa Mahkamah Tinggi menolak permohonan perayu-perayu.

(4) Oleh kerana perayu-perayu bukan pemegang lesen, maka mereka tidak mempunyai pengharapan sah bahawa kelulusan tidak akan ditarik balik sehinggalah mereka membuat representasi. Mereka hanya boleh berharap bahawa kelulusan kepada pemilik tanah tidak akan ditarik balik ekoran mana mereka juga akan memperoleh manfaatnya. Mereka tidak boleh menuntut kepentingan atau hak yang lebih baik dari pemilik tanah.

Oleh Gopal Sri Ram HMR (menentang)

(1) Terdapat hanya satu persoalan yang mewajarkan pertimbangan. Ia adalah kesan di sisi undang-undang terhadap janji atau representasi yang dibuat oleh Presiden responden di majlis yang dihadiri oleh perayu-perayu bahawa mereka boleh terus berniaga di Pasar Fuji. Hak-hak perayu-perayu di sisi undang-undang awam, jika ada, harus ditentukan dengan mengambilkira doktrin mantap pengharapan sah.

(2) Terdapat keterangan mengenai representasi jelas yang dibuat oleh Presiden responden bahawa perayu-perayu boleh terus berniaga di Pasar Fuji. Maka adalah munasabah untuk perayu-perayu bergantung kepada representasi tersebut, mengambilkira bahawa representasi datangnya dari sumber yang berautoriti dan fakta bahawa ia berkaitan dengan perkara yang menyentuhi mata pencarian perayu-perayu. Lagipun, sifat pemberian representasi bukanlah tidak konsisten dengan tanggungjawab statutori yang dipikul oleh responden. Oleh itu, responden, selaku sebuah badan awam adalah secara adilnya terikat dengan representasi yang dibuat. Representasi yang dibuat kepada perayu-perayu sebagai satu kumpulan orang, iaitu sebagai pemilik gerai di Pasar Fuji, telah memberikan mereka hak untuk terus kekal di Pasar Fuji, suatu hak yang boleh mengasaskan suatu tuntutan sah.

(3) Yang arif hakim cuba mencari priviti kontrak atau suatu bentuk hubungan undang-undang lain di antara perayu-perayu dan responden. Itu adalah satu salah arahan yang serius. Tuntutan perayu-perayu di Mahkamah Tinggi bukan berdasarkan tindakan undang-undang persendirian kontrak atau tort terhadap responden. Ia adalah tuntutan untuk semakan kehakiman, iaitu suatu remedi undang-undang awam. Tindakan merujuk kepada prinsip undang-undang persendirian bagi mengadili suatu tuntutan undang-undang awam adalah satu kesilapan serius.

(4) Yang arif hakim telah menolak relif atas alasan *locus standi.* Pendekatan sebegitu jelas menyalahi A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980. Keputusan responden untuk tidak mengotakan janji-janjinya telah memprejudiskan hak perayu-perayu kepada mata pencarian hidup. Perayu-perayu adalah orang-orang yang terjejas oleh keputusan responden.

(5) Dengan wujudnya suatu hak yang sedia wujud di antara sebuah badan awam yang membuat janji atau representasi dengan orang yang janji atau representasi tersebut ditujukan, maka ianya tidak menjadi suatu *sine qua non* bagi penguatkuasaan doktrin pengharapan sah. Undang-undang telah maju ke depan sebegitu jauh sehingga mahkamah sudah boleh menguatkuasakan janji-janji atau representasi yang dibuat oleh atau bagi pihak badan awam kepada mereka yang akan terjejas jika janji-janji atau representasi tersebut dimungkiri. Jika sebuah badan awam

memungkiri janji-janjinya, maka orang-orang yang terjejas oleh kemungkiran atau ketinggalan tersebut berhak untuk mendapatkan relif sewajarnya melalui semakan kehakiman. Berdasarkan autoriti-autoriti, ianya boleh dirumuskan bahawa kewujudan suatu pengharapan sah adalah memadai, hanya atas alasan itu sahaja, untuk memberikan *locus standi* kepada seorang pemohon untuk memulakan tindakan permohonan semakan kehakiman. Juga, dalam kes semasa, tidak wujud sebarang tekanan kepentingan awam yang boleh menidakkan pengharapan sah perayu-perayu.

Case(s) referred to:

Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 ***(refd)***

Berthelsen v. Director of Immigration [1998] 1 MLJ 134 ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374 ***(refd)***

Food Corporation of India v. Kamadhenu Cattle Feed Industries AIR [1993] SC 1601 ***(refd)***

JP Bethelson v. Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Mc lnnes v. Onslow Fane [1978] 3 All ER 217 ***(refd)***

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 ***(refd)***

President, District Council, Batu Pahat v. Lo Hong Tan & Ors [1983] 1 CLJ 175; [1983] CLJ (Rep) 331 FC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R v. Barnsley Metropolitan Borough Council [1976] 3 All ER 452 ***(refd)***

R v. Brent LBC exp Mac Donagh [1990] COD 3 ***(refd)***

R v. Devon County Council; ex p Baker [1995] 1 All ER 73 ***(refd)***

R v. Enfield LBC exp TF Unwin (Roydon) Ltd [1989] 1 Admin LR 51 ***(refd)***

R v. IRC ex parte Camq Corp [1993] 1 WLR 191 ***(refd)***

R v. Jockey Club Ex p RAM Racecourses Ltd [1993] All ER 225 ***(refd)***

R v. Liverpool Corporation, exp Liverpool Taxi Fleet Operators' Association [1972] 2 QB 229 ***(refd)***

R v. North and East Devon Health Authority, ex p Coughlan [2001] QB 213 ***(refd)***

R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61 ***(refd)***

R (Reprotech (Pebsham) Ltd) v. East Sussex CC [2002] UKHL 8

Samsuri Hj Dullah v. Sandakan Municipal Council [1988] 1 CLJ 581; [1988] 2 CLJ (Rep) 407 HC ***(refd)***

Schmidt v. Secretary of State for Home Affairs [1969] All ER 904 ***(refd)*** A
Union of India v. Hindustan Development Corporation AIR [1994] SC 980 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53 B

Other source(s) referred to:
De Smith, Woolf and Jowell, *Judicial Review of Administrative Action,* 5th edn, paras 8-37
De Smith's Judicial Review, 6th edn, p 616
Professor SA de Smith, *Judicial Review of Administrative Action,* 3rd edn, 1973, p 197 C

For the appellants - Chung Jiun Dau; M/s Chung & Assoc
For the respondent - Hamid Hamzah Mydin; M/s Amin Jaafar & Co

[Appeal from High Court, Tawau; Judicial Review No: T-1-2001] D

[Editor's note: For the High Court judgment, please see Law Pang Ching & 67 Ors v. Tawau Municipal Council [2002] 1 LNS 103.]

Reported by Usha Thiagarajah

E

JUDGMENT

Raus Sharif JCA:

[1] The appellants are stallholders of Fuji Market ("the market"). F
The market stands on two pieces of land situated at Jalan Sin Onn, Tawau, owned by Hongkong & Canton Food Industries Sdn Bhd. The land owner built the market after obtaining an approval from Tawau Municipal Council ("the respondent"). The market started its operation in 1992. G

[2] Subsequently, the land in which the market was situated was transferred to ATS Land Sdn Bhd ("ATS"). Hence, ATS became the operator of the market. As the operator, ATS, like the previous land owner, had to pay the respondent certain sum of money representing the fees payable for the license of operating the stalls. ATS in turn, collected from the stallholders RM30 per month per stall. H

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[3] By letters dated 30 April 2001, 6 July 2001 and 16 July 2001 to ATS, the respondent indicated its decision to terminate the operation of the Market. The stallholders appealed to the respondent to reconsider its decision *vide* their letter dated 28 May 2001. However, in a letter dated 19 October 2001 issued to the stallholders, including the appellants, the respondent requested them to move out. Hence, this application by the appellants.

[4] The applicants sought for several reliefs. Basically they were seeking for an order of *certiorari* to quash the decision by the respondent contained in its letters dated 30 April 2001, 6 July 2001 and 16 July 2001 to ATS, to terminate or revoke the approval granted to ATS to operate or manage the market. In effect, they wanted ATS to continue operating the market.

[5] The learned High Court Judge dismissed the appellants' application with costs. Before us, a number of grounds were raised. But the real issue is whether there was a failure of the respondent to adhere to the principle of natural justice and fairness in making its decision to terminate the Market. The instances of such failure were the absence of reasons for the termination and not giving the appellants any real opportunity to make representation before the termination was made.

[6] The learned High Court Judge dealt with the issue in the following manner:

> As regards the arguments that there was no reason given for the decision to terminate the Market and that the applicants were not given any or adequate opportunity to make representation before the termination was made, I think such contentions were misconceived. There was no denial that the Market affair was between the respondent and ATS. The letters of approval (LPC-6, LPC-11 and LPC-12 of Enclosure 3) and subsequently the termination (LPC-7 of Enclosure 3) were addressed to ATS. It was ATS that was expected to make the payment for the stall – license fees. Receipts for the payment of such fees were in the name of ATS. Yet ATS was not before the Court as an applicant for such order as prayed for by the applicants in this case. And although the applicants asserted that they were in fact the parties that paid for the fees through ATS that could not be said to have earned them the same position as ATS. As between the applicants and ATS their relationship at best would be contractual in which the respondent was not a party.

[7] I am in complete agreement with the reasoning of the learned High Court Judge. As rightly pointed out by the learned High Court Judge, the affairs of the Market was between ATS and the respondent. The letters of approval and subsequently the termination of the market were addressed to ATS. Thus, any complaint that the respondent did not adhere to the principle of natural justice in making its decision to terminate the operations of the market rightly should come from ATS, not the appellants. But ATS did not complain. ATS did not even file any affidavit in support of the allegations as alleged by the appellants. Presumably, it had accepted the decision of the respondent to terminate the market.

[8] Furthermore, the facts of this case clearly revealed that the appellants had no contractual relationship with the respondent. The appellants were strangers to the arrangement between ATS and the respondent. Hence, they could not step into the shoe of ATS; to complaint that they had been deprived by the respondent of the right to be heard and the due process. They have no *locus standi* to do so.

[9] It was strongly argued by the appellants that the President of the respondent had sometime in 1998, at a function, announced that the stallholders including the appellants could carry on business at the Market and this had created a legitimate expectation on the part of the appellants of procedural fairness in the decision making of the respondent in terminating the market.

[10] With respect, I am not persuaded with the said argument. The argument would have been valid, if, the land where the market stands belongs to the respondent. But this is not the case. The land does not belong to the respondent. The market stands on a privately owned land. The registered owner is ATS. It is for this reason that the cases of *Berthelsen v. Director of Immigration* [1998] 1 MLJ 134, *Samsuri Hj. Dullah v. Sandakan Municipal Council* [1988] 1 CLJ 581; [1988] 2 CLJ (Rep) 407, *President of Batu Pahat v. Lo Hong Tan* [1983] 1 CLJ 175; [1983] CLJ (Rep) 331, and *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 cited in support are of no assistance to the appellants.

[11] For the above said reasons, the appeal must be dismissed with costs. The deposit in this court shall be paid to the respondent to account of its taxed costs.

Abu Samah Nordin JCA:

[12] This is an appeal by the appellants against the decision of the learned High Court Judge who dismissed their application for judicial review under O. 53 of the Rules of the High Court 1980 ('RHC'). In their application, they seek the following reliefs:

(1) An order of *certiorari* to remove into this Honourable Court and to quash forthwith the decision by Tawau Municipal Council, as contained in its letters dated 16 July 2001, 6 July 2001 and 30 April 2001 to ATS Land Sdn Bhd, to terminate or revoke the approval dated 20 April 2000 granted to ATS Land Sdn Bhd to operate or manage the market known as Fuji Market on the lands held under documents of title TL 10751123 and TL 10751124 at Jalan Sin Onn, Tawau;

(2) A declaration that any decision by Tawau Municipal Council to terminate or revoke the approval dated 20 April 2000, granted to ATS Land Sdn Bhd to operate or manage the market known as Fuji Market on the lands held under documents of title TL 10751123 and TL 10751124 at Jalan Sin Onn, Tawau, on the reasons or the grounds as stated in Tawau Municipal Council's minutes of meeting dated 18 April 2001 (Ref: MPT/URSM: 100-26/Klt.12/) and 30 April 2001 (Ref: MPT/URSM: 100-26/Klt.13/01) is invalid, null and void;

(3) A declaration that Tawau Municipal Council's letters dated 16 July 2001, 6 July 2001 and 30 April 2001 at ATS land Sdn Bhd are invalid, null and void;

(4) An order of prohibition directed to Tawau Municipal Council and any officer/s, servant/s, agent/s or contractor/s acting for or in its behalf prohibiting it or them, from entering the market known as Fuji Market being conducted on the lands held under documents of title TL 10-751123 and TL 10751124 at Jalan Sin Onn, Tawau, or doing anything for he purpose of ceasing all market or business activities in Fuji Market unless and until there has been a proper and lawful decision by Tawau Municipal Council to terminate the approval dated 20 April 2000 to the Landowner, ATS Land Sdn Bhd to

operate or manage the market known as Fuji Market in accordance with law and in accordance with the principles of natural justice;

(5) That all proceedings on the decision of Tawau Municipal Council, to terminate or revoke the approval dated 20 April 2000 to the Landowner, ATS Land Sdn Bhd to operate or manage the market known as Fuji Market on the lands held under documents of title TL 10751123 and TL 10751124 at Jalan Sin Onn, Tawau, be stayed until after the hearing of the application for judicial review or further order;

The Facts

[13] The appellants are stallholders at a market known as Fuji Market in Tawau. The market stands on two pieces of lands owned by ATS Land Sdn Bhd ('the landowner'). It consists of 104 hawker stalls and had been in operation since 1992. The present landowner took over possession of the market on 30 September 1998 after it bought over the lands from their previous owner.

[14] It was given a trading licence to continue the operation of the market with retrospective effect from 1 November 1998. This is contained in the respondent's letter of approval dated 20 April 2000. It is not in dispute that the trading licence is not given to individual stallholders. They merely paid their respective fees to the landowner, who then paid them to the respondent. The approval was for a temporary period, based on a monthly basis. It was not for an indefinite period. This is stated in para 2.2 of the said letter, which reads as follows:

> kelulusan ini adalah berbentuk sementara dan akan terus sah dan berkuatkuasa untuk bulan-bulan seterusnya KECUALI ia ditamatkan oleh Majlis dengan memberi notis bertulis selama empat (4) minggu kepada pihak tuan.

[15] At the luncheon hosted by the landowner at Marco Polo Hotel in Tawau, on 30 September 1998, the appellants claimed that the President of Tawau Municipal Council, gave a verbal representation that the respondent had no problem in allowing them to carry on their businesses at the market. The President of the Council admitted making such verbal representation but in his affidavit he clarified that it was made to the landowner and not to the appellants.

[16] Following the said representation, the landowner had written two letters dated 11 November 1998 and 17 September 1998 respectively to the respondent for a written assurance which the respondent did not bother to reply. It was only on 20 April 2000 that the respondent gave a written approval to the landowner subject, among others, to the conditions which I had adverted to earlier. The market is well known to the residents of Tawau. The stallholders had been carrying on their businesses there for years without any grievances or unnecessary harassment from the respondent.

[17] Then comes the bombshell. On 30 April 2001 the landowner received a termination notice from the respondent to cease the operation of the market by or before 1 June 2001. This notice was superceded by another termination letter, dated 6.7.2001 to cease operation of the market by or before 5 August 2001, which notice was subsequently replaced by another letter, dated 16 July 2001, directing the landowner to cease the operation of the market by or before 15 October 2001. The respondent did not give any reasons for its decision.

[18] This prompted the landowner's solicitors to write to the respondent on 25 May 2001 asking for its reasons to close the market abruptly and to reconsider its decision, failing which, it would take legal action. The respondent's solicitor's reply on 25 June 2001 was that the termination was made pursuant to para 2.2 of the respondent's letter of approval and under its by-laws. Prior to the said reply the landowner had written no less than five other letters appealing against the decision to close the market. The affected stallholders were only informed of the said termination by the landowner. There was no direct correspondence between the respondent and the appellants. Attempts to persuade the respondent to reconsider and to revoke its decision, including an appeal by the state assemblyman for Sri Tanjung, Tawau constituency on behalf of the appellants were unsuccessful.

[19] In the end the landowner had no choice but to inform the appellants by letter dated 30 August 2001 to stop trading at the market by or before 15 October 2001. The landowner also advised the appellants that it had decided not to pursue any legal action against the respondent's decision to terminate the operation of the market.

[20] Faced with the inevitable prospect of having to cease trading at the market, the appellants turned to the High Court for judicial review to quash the decision of the respondent. The High Court dismissed their application with costs.

Grounds Of Appeal

[21] Several grounds of appeal were canvassed before us, including breach of principles of natural justice in that they were not given the opportunity to be heard and to make representations; that they have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first giving them the opportunity to make representations in view of the said verbal assurance by the respondent's President; breach of procedural fairness in that the respondent had not acted fairly and did not give any reason for its decision; taking into account irrelevant considerations and failed to take into account relevant considerations, including their right to livelihood, which is a proprietary right as guaranteed by the constitution.

[22] Another ground is that the respondent's decision is *ultra vires* and in violation of its statutory duty when it covenanted with a third party, namely Renung Abadi Sdn Bhd ('RASB') to lease its land to the latter to operate another market, known as Xin Ann market and agreed to bind itself not to renew/grant permission or issue licences to any person or company to operate a market place within three miles radius of Xin Ann market. By so doing, it has fettered its discretion and disabled itself from exercising its statutory duties in the way which is expected of it.

[23] Having heard the parties, I am of the view that there is only one ground that merits further consideration, that is, whether the appellants have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first giving them the opportunity to make representations. It is not in dispute that the respondent did not hear them in person. It is also not in dispute that the respondent did not give them any reply to their letters or pleas made on their behalf by the landowner as well as by the state assemblyman.

[24] The phrase "legitimate expectation" was first employed in *Schmidt v. Secretary of State for Home Affairs* [1969] All ER 904. In that case a foreign student sought review of the Home Secretary's decision not to grant an extension of his temporary permit to stay

in the United Kingdom. In rejecting his contention that he ought to have been afforded a hearing, Lord Denning, MR, at p. 909 said:

> The speeches in *Ridge v. Baldwin* [1963] 2 All ER 66 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

[25] Since then, the doctrine of legitimate expectation had been applied in many different circumstances. In *R v. Brent L.B.C. exp. Mac Donagh* [1990] COD 3; 21 HLR 494, gypsies had a legitimate expectation that a council would not evict them without finding them an alternative site. In *R v. Enfield L.B.C. exp. T.F. Unwin (Roydon) Ltd* [1989] 1 Admin. LR 51, contractors had a legitimate expectation that they would not be removed from the list without a hearing. In *R v. Liverpool Corporation, exp. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 229, it was held that the corporation's decision to increase the number of taxi licences without consulting the Operator's Association was unfair because the decision was in breach of an assurance to the contrary.

[26] In *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983]2 AC 629, the applicant who was born in China entered Hong Kong illegally from Macau in 1967. By 1980, he was the partime owner of a small factory. In October, the same year, the government announced changes in its immigration policy and that each illegal entrant from Macau would be interviewed and his case "treated on its merit's". After being questioned and detained, the Director of Immigration made a removal order against him without giving him an opportunity of making any representations as to why he should not be removed. The applicant applied to the High Court for orders of *certiorari* to quash the removal order and prohibition restraining the director from executing it. The High Court refused his application. On appeal, the Court of Appeal granted an order of prohibition preventing the director from executing the removal order until he had given the applicant an opportunity to be heard.

[27] The Attorney General's appeal to the Privy Council was dismissed. Lord Fraser of Tullyberton, in delivering the judgment of the Privy Council described the phrase 'legitimate expectation' as follows:

> Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *Reg v. Criminal Injuries Compensation Board Exparte Lain* [1967] 2 QB 864. So it was held in *Reg v. Board of Visitors of Hull Prison, Ex Parte St. Germain (No. 2)* [1979] WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.

At p. 637, Lord Tullyberton added:

> The expectations may be based upon some statement or undertaking by, or on behalf of the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an enquiry.

[28] Lord Diplock in *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374 at pp. 408-409 held that for a legitimate expectation to arise the decision must affect the other person:

> by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[29] The learned counsel for the appellants referred to *R v. Barnsley Metropolitan Borough Council* [1976] 3 All ER 452 and *Mc lnnes v. Onslow Fane* [1978] 3 All ER 217 to fortify his client's case. It is thus pertinent to look at those cases. In the first case, the applicant was a trader who traded from a stall in the market for six years without a complaint. One evening, after the market had closed, the applicant had an urgent call of nature. As the public lavatories were locked, the applicant went into a side street and urinated there. Following a complaint of his behaviour, the local authority decided to ban the applicant from trading in the market and to revoke his right to a stall without hearing him or his representative, when the market manager gave evidence before

A the local authority's subcommittee deliberating on his case. The applicant applied to the Divisional Court for an order of *certiorari* to quash the decision. It was dismissed. The Court of Appeal allowed his appeal and granted an order of *certiorari* on the ground, among others, that there was a breach of the rules of
B natural justice. Scarman LJ in considering the gravity of the local authority's decision quoted a passage by the late Professor SA de Smith in his book, *Judicial Review of Administrative Action*, 3rd edn. [1973] at p. 197 which reads as follows:

C
> Non-renewal of an existing licence is usually a more serious matter than refusal to grant a license in the first place. Unless a licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to
D imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, even through no such duty is implied in the making of the original decision to grant or refuse the licence.

E Scarman LJ observed that although the learned author was dealing with non-renewal, "everything that he says about non-renewal applies with even greater force to revocation".

[30] In *Mc Innes v. Onslow Fane and Another* Megarry VC advanced at least three categories in which the court is entitled
F to intervene. First there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases
G where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some
H legitimate expectation from what has already happened that his application will be granted. This head include cases where an existing licence-holder applies for a renewal of his licence or a person already elected or appointed to some position seeks confirmation from some confirming authority.

I

[31] The doctrine of legitimate expectation had been invoked by the Supreme Court (as it then was) in *JP Bethelson v. Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134. In that case the Supreme Court held that the appellant, an American working in Kuala Lumpur as a staff correspondent with Asian Wall Street Journal had a legitimate expectation that his employment pass would not be cancelled prior to giving him a right to make representations. Abdool cader SCJ, at p. 138 said that, "all that need be given was an opportunity to the appellant to make representations".

[32] A common trait in all these cases is that the aggrieved parties stand in direct relationship – without any go-between – with the decision makers. The expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. See *De Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th edn. paras 8-37.

[33] With these cases in mind, can the appellants seriously claim that they have a legitimate expectation that the approval to continue trading at the market would not be withdrawn without first hearing their representations? The indisputable facts are these. The appellants are not the licenceholders. They have no direct dealing with the respondent. The licenceholder is the landowner. The appellants had been allowed to do business under a licence granted to the landowner on the land owned by the latter, which had been approved for a commercial development. The verbal assurance by the respondent's President was made at a luncheon hosted by the latter in the presence of some of the stallholders. It would not be incorrect to say that they were there as invited guests. There was no suggestion that they co-hosted the function. The only logical and reasonable conclusion is that the assurance or representation must have been made or given to the landowner although it was a welcome news to the appellants.

[34] Next, there is this insurmountable problem. The landowner is not a party to this application. It has taken a stand that it would not seek legal recourse and would abide by the decision of the respondent. This was decided after its impassioned pleas to the respondent, both on its own behalf as well as for the appellants had been unsuccessful. Consequently it had, in writing, advised the appellants to cease trading at the market.

[35] The reliefs sought by the appellants are essentially for the direct benefit of the landowner, who is the licenseholder, although the appellants would stand to gain, if they succeed in this application. Yet, the landowner is not before the court. This was one of the grounds why the High Court dismissed the appellant's application.

[36] In my judgment, being in the position where they are in, the appellants do not have a legitimate expectation that the approval would not be withdrawn until they have made their representations, when in the first place they are not the licenseholders. They can only hope that the approval to the landowner would not be withdrawn from which they would have benefited. But they cannot claim to have a better interest or right than the landowner. It is obvious that they do not fall into any of the categories referred to in *Mc Innes v. Onslow Fane and Another*.

[37] For the foregoing reasons, I am of the considered view that the appeal ought to be dismissed with costs. The deposit is to be paid to the respondent on account of taxed costs.

[38] I have had the privilege of reading the judgments in draft of both of my learned brothers and I am in agreement with my learned brother Raus Shariff that this appeal be dismissed with costs.

Gopal Sri Ram JCA:

[39] The appellants are stallholders at the Fuji Market in Tawau. The market stands on privately owned land. It was established in by the previous proprietor to the land after obtaining approval from the respondent local authority to construct stalls. The appellants had no contractual relationship with the respondent. They merely paid all dues to the land owner who paid them on to the respondent. Later, the land in question was transferred to ATS Land Sdn Bhd ("ATS") which is the present registered proprietor. As before, ATS collected the licence fees from the appellants and paid them on to the respondent. It is in evidence and freely admitted by the respondent that in 1998 its President attended a lunch organised by the stallholders and, in his speech made to the gathering, represented that the appellants could continue to do business at Fuji Market. However, by a letter dated 30 April 2001 addressed to ATS and received by it on

28 May 2001, the respondent terminated the operation of Fuji Market. Following some correspondence, the respondent, on 19 October 2001 wrote to the appellants and other stallholders asking them to move out of Fuji Market. There is material on record to show that the respondent had leased a piece of land owned by it to a company Renung Abadi Sdn Bhd ("Renung") and granted it the right to operate another market there called the Xin Ann Market. The lease was for 25 years and there is a term in it that the respondent is not to grant or renew permission to anyone to operate a market within a 3 mile radius of Xin Ann Market. Matters pertaining to the Fuji and Xin Ann Markets were discussed at a meeting of the respondent held on 30 April 2001. The minutes of that meeting show that Renung had commenced an action against the respondent for damages for breach of the terms of the lease and that it had called on the respondent to close down the Fuji Market which the respondent had agreed to do. Later, the appellants instituted proceedings for judicial review and on 17 January 2002 obtained leave. Twelve days later, on 29 January 2002 the stallholders at Fuji Market were offered places at the Xin Ann Market. Some of the stallholders moved there. But the appellants refused. They pursued their application for judicial review in which they sought *certiorari* and declaratory relief. The High Court dismissed their application and they have appealed to this court. So much for the facts.

[40] Although a number of grounds were argued before the learned judge and before us, there is really only one point that merits consideration. It is the effect in law of the promise or representation – call it what you will – made by the respondent's President to the gathering at which the appellants were present that they could carry on doing business at the Fuji Market. In my judgment the rights, if any, of the appellants' in public law fall to be determined by reference to the now well established doctrine of legitimate expectation.

[41] The starting point is *Berthelsen v. Director General of Immigration* [1987] 1 MLJ 134 where the Supreme Court held that a foreign national who was in this country by virtue of an employment pass had a legitimate expectation to receive procedural fairness before the cancellation of his pass by the relevant authority. The court quoted with approval the following passage in the judgment of Lord Fraser of Tullybelton in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629:

A Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *Reg v. Criminal Injuries Compensation Board Ex parte Lain* [1967] 2 QB 864. So it was held in *Reg v. Board of Visitors of Hull Prison Ex parte St Germain (No 2)* [1979] 1 WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.

C **[42]** In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65, the Federal Court held, *inter alia*, that the doctrine of legitimate expectation had both a procedural and a substantive dimension. In so doing, it expressly approved the approach adopted by Simon D Brown LJ (now Lord Brown of Eaton-under-Heywood) in *R v. Devon County Council; ex p Baker* [1995] 1 All ER 73 stated in the following terms:

E Sometimes the phrase [legitimate expectation] is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v. Secretary of State for the Home Department, ex p Asif Mahmood Khan* [1983] 1 All ER 40, [1984] 1 WLR 1337 and *R v. Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. It was used in the F same sense but unsuccessfully in, for instance, *R v. Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, [1990] 1 WLR 1545, and [1991] 3 Admin LR 265. These various authorities show that *the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or* G *other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it.* The doctrine employed in this sense is akin to an estoppel in so far as the public body's representation is communicated by way of a H stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v. Torbay BC, ex p Cleasby* [1991] COD 142; of the latter, *ex p Khan*. (emphasis added.)

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[43] In *R v. North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213, Lord Woolf CJ recognised that the doctrine of legitimate expectation may entitle persons affected to a substantive benefit. And, Lord Hoffmann when delivering his speech in *R (Reprotech (Pebsham) Ltd) v. East Sussex CC* [2002] UKHL 8, approved Coughlan. In the very recent decision of the House of Lords in *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 (speeches handed down on 22 October 2008), Lord Carswell, while electing to remain silent on the limits of the doctrine of substantive legitimate expectation, accepted that substantive enforceable rights could be conferred by the doctrine of legitimate expectation. He said:

> The final issue which I want to discuss is that of legitimate expectation. All members of the Court of Appeal were in agreement that the Chagossians had a legitimate expectation that they would be permitted to return, and that the prohibition contained in the 2004 Orders in Council brought about a breach of that. The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in *R v. North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, 354, para 34 Lord Hoffmann accepted Coughlan as correct. I would therefore prefer not to express a concluded opinion on the limits of the concept. *I am content, however, for present purposes to accept that breach of such an expectation can give rise to an actionable claim and to consider the issue on that basis.* (emphasis added)

[44] I may add that the decided cases make it abundantly clear that the representation may be directed either at "a single individual, or a number of individuals or a class". (See, *De Smith's Judicial Review*, 6th edn, p. 616, citing Coughlan, "where residents of a home for severely disabled people had been promised a 'home for life'"; *R v. Jockey Club Ex p RAM Racecourses Ltd* [1993] All ER 225 and *R v. IRC ex parte Camq Corp* [1993] 1 WLR 191.

[45] Now apply the principles enunciated in the above quoted authorities to the facts of the present case. Here we have evidence of a clear and unambiguous representation by the respondent's President that the appellants could continue to do

business at Fuji Market. It was certainly reasonable for the appellants to rely on this representation given the authoritative source from which the representation came and the fact that it related to a matter affecting the appellants' livelihood. Moreover, the nature of the representation made is not inconsistent with the statutory duties imposed upon the respondent. As such, the respondent as a public body is bound in fairness by the representation made. Put a little differently, the representation made to the appellants as a class of persons, namely the stall holders in Fuji Market, conferred on them a substantive right to continue remain at Fuji Market; a right that gave rise to an actionable claim.

[46] In his judgment, the learned judge said this when refusing judicial review:

> As regards the arguments that there was no reason given for the decision to terminate the Market and that the applicants were not given any or adequate opportunity to make presentation before the termination was made, I think such contentions were misconceived. There was no denial that the Market affair was between the respondent and ATS. The letters of approval (LPC-6, LPC-11 and LPC-12 of Enclosure 3) and subsequently the termination (LPC-7 of Enclosure 3) were addressed to ATS. It was ATS that was expected to make the payment for the stall – license fees. Receipts for the payment of such fees were in the name of ATS. Yet ATS was not before the Court as an applicant for such order as prayed for by the applicants in this case. And although the applicants asserted that they were in fact the parties that paid for the fees through ATS that could not be said to have earned them the same position as ATS. As between the applicants and ATS their relationship at best would be contractual in which the respondent was not a party.

[47] It may be seen from the above quoted passage that what the learned judge was looking for was some privity of contract or other legal relationship between the appellants and the respondent. With respect, this is a serious misdirection. The appellants' claim before the High Court was not based upon a private law action in contract or tort against the respondent. It was a claim for the public law remedy of judicial review. By adjudging a claim in public law with reference to private law principles is, in my respectful view a serious error.

[48] Viewed from another perspective, the passage already quoted makes it equally obvious that the learned judge denied relief on the ground of *locus standi*. This approach clearly falls foul of the standing granted by RHC O. 53. The appellants were clearly persons who were adversely affected by the respondent's decision that was made in violation of the representation already adverted to earlier in this judgement. They therefore had both threshold as well as substantive *locus standi* and hence were entitled to relief by way of judicial review. The law relating to *locus standi* in applications for judicial review under O. 53 was stated by this court in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 as follows:

> There is a single test of threshold *locus standi* for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned (see *Finlay v. Canada* [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.
>
> [17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation.

[49] Now apply that test to the facts of this case. Here you have a group of stallholders – the appellants – who earn their daily bread by trading their wares at Fuji Market. No doubt the land upon which they ply their trade is not their own. No doubt they have no contractual nexus with the respondent. Yet, they cannot earn their livelihood at Fuji Market unless the respondent issues the relevant licences. Then you have the representation by the respondent's President that the appellants could continue to earn a living at Fuji Market. The respondent's decision to go back

upon its word prejudices the appellants' right to their livelihood. Taking these facts together – in their totality – it is my judgment that the appellants are persons who are adversely affected by the respondent's decision.

[50] For my part, I am prepared to hold that even if all other facts were absent here, the making of the representation by the respondent would confer standing on upon the appellants. In my judgment, a pre-existing legal relationship between the public body making the promise or representation and the person to whom it is made is not a *sine qua non* for the doctrine of legitimate expectation to bite. The law has developed far enough for the courts to enforce promises or representations made by or on behalf of a public body to persons who will be adversely affected if those promises or representations are reneged upon. If a public body goes back on its word, the persons adversely affected by its act or omission will be able to obtain the appropriate relief by way of judicial review. As Verma J said in *Food Corporation of India v. Kamadhenu Cattle Feed Industries* AIR [1993] SC 1601:

> There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the *bona fides* of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

[51] Almost 15 years earlier, Raja Azlan Shah Ag CJ (Malaya) expressed the same view *albeit* in different words in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135:

> Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

[52] From these authorities I come to the conclusion that the existence of a legitimate expectation is sufficient in itself to confer *locus standi* upon an applicant to bring an application for judicial review. A similar view was expressed in *Union of India v. Hindustan Development Corporation* AIR [1994] SC 980, although the discussion there was confined to the role of legitimate expectation in the sphere procedural fairness. This is unsurprising as that case was decided before the recognition of the substantive dimension that the doctrine possesses.

[53] Before concluding, I must mention the article by Professor Christopher Forsyth titled *"Wednesbury Protection of Substantive Legitimate Expectation"* (1997) Public Law 375 which I have found to be of considerable assistance. In it Professor Forsyth expresses the following view to which I subscribe:

> The protection of the trust placed by individuals in the statements of officials is, it is submitted, of great importance. Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices. The law expects high standards from public bodies in such circumstances. As Simon Brown LJ said in *ex p Unilever (R. v. Commissioner of Inland Revenue, ex parte Unilever Plc* [1996] STC 681) 'Public authorities in general ... are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens'. Thus, save where there is an overriding public interest, it is submitted that it will generally be unreasonable to leave substantive legitimate expectations unprotected.

All that needs to be added is that in the present instance there is no overriding public interest that calls for a negation of the legitimate expectation created in the appellants by the representation earlier adverted to.

[54] It follows from what I have said thus far that the respondent's decision to close down Fuji Market is null and void and of no effect. The appellants are therefore entitled to the orders sought by them. I would accordingly allow the appeal and set aside the orders of the High Court. There shall be an order in terms of the motion for judicial review. The respondent must pay the costs of this appeal and those incurred in the court below.